SUPREME COURT, U. S.
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No. 70-326

In the Supreme Court of the United States

OCTOBER TERM, 1971

WILLIAM EARL JOHNSTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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After a jury trial in the United States District Court for the Southern District of California, petitioner was convicted of smuggling marihuana and concealing unlawfully imported marihuana, in violation of 21 U.S.C. 176a. He was sentenced to concurrent mandatory minimum prison terms of five years. The court of appeals affirmed *per curiam* (Pet. App. A).

The evidence showed that on January 27, 1970, petitioner entered the United States from Mexico at Andrade, California in a pickup camper. The customs inspector asked petitioner to drive to the secondary inspection area where the agent examined the camper

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He noticed that there was a hidden compartment in the camper covered over with a screwed-on board. The inspector unscrewed the board and observed several plastic, rectangular packages wrapped in tan paper in the manner customarily used to package marihuana. The inspector placed petitioner under arrest. A subsequent search of the camper disclosed that there were eighty kilo packages containing marihuana (Tr. 5–11, 20–23).[1] In addition a note was found in a sports jacket belonging to petitioner in the camper. The note contained the words "plastic", "screwdriver", and "tighten", and the last line said "plastic bag for pot" (Tr. 23–24; see Tr. 70).

Petitioner testified that he did not know marihuana was in the camper until the inspector discovered it. He testified that he had traveled with a man named Butler to Mexico; that at one point he had gone to Yuma by himself for two days and had left the camper with Butler; and that when petitioner returned, Butler was gone so petitioner returned to the United States alone. Petitioner admitted that the camper was his and that he knew of the hidden compartment (Tr. 43, 56–58).

At the close of the evidence, petitioner's counsel requested an instruction as to a lesser included offense of smuggling "merchandise" into the United States under 18 U.S.C. 545. The trial judge ruled that he would not give the instruction since in his view the evidence established no reasonable basis on which the jury could find that petitioner knew there was mer-

[1] "Tr." refers to the transcript of proceedings at trial, a copy of which we are lodging with the Clerk.

chandise in the hidden compartment of the camper, but did not know it was marihuana (Tr. 61–64). The court of appeals held that the trial judge acted properly since, in its view, the offense of smuggling merchandise is not a lesser included offense to the charge of smuggling marihuana under 21 U.S.C. 176a (Pet. App. A).

The trial court's refusal to give the requested instruction was clearly correct. As the trial judge stated, the case resolved itself into whether petitioner knew he had marihuana in the camper or not. He denied having knowledge that there was *anything* being smuggled. On the other hand, his ownership of the camper, knowledge of the compartment, and the note in his jacket pocket all pointed to his guilt, as the jury concluded. In these circumstances, no lesser included offense instruction was appropriate even assuming that 18 U.S.C. 545 qualified as a lesser included offense within the teaching of *Sansone* v. *United States*, 380 U.S. 343.

Moreover, as the court of appeals indicated (see also *Olais-Castro* v. *United States*, 416 F. 2d 1155 (C.A. 9)), it is highly doubtful if a defendant charged under Section 176a could ever properly be entitled to the lesser included offense charge requested by petitioner. Congress, by the language of Section 176a, may well have intended to make that section, with its mandatory minimum sentence, exclusive with respect to smuggled marihuana.[2] Petitioner's claim would be

[2] Section 176a was repealed by the Comprehensive Drug Abuse Prevention and Control Act of 1970, 84 Stat. 1236, 1291, so the issue raised here is of no significance for the future.

plausible at all only in the context of a person who knew he was smuggling goods that needed to be invoiced but did not know that what he was smuggling was marihuana, and there was no evidence in this case that might have led a jury to make that finding.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

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